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ABSTRACT

Stan and Nancy Harris filed a complaint against Kirit C. Shah, M.D., for misdiagnosing Mr. Harris's illness, charging Dr. Shah with negligence and asking for damages. A medical malpractice action in Indiana is governed by a two year statute of limitations. Because the Harrises failed to bring their action against Dr. Shah within this two year period, Dr. Shah filed a motion for summary judgment and later appealed. This set of three lesson plans uses the Shah v. Harris case to study the concepts of construction of legal arguments, statutes of limitations, and medical malpractice. Lessons are entitled: (1) "One Case, Two Sides"; (2) "How Long Is Too Long?"; and (3) "Oral Arguments On-Line." Each lesson presents background information; states learning objectives; lists online resources; cites relevant cases; provides learning activities; suggests materials for further study; and addresses related Indiana Social Studies Standards. The set also contains a relevant glossary; a case summary; the Appellee Case Brief; the Appellant Case Brief; the Order Denying Transfer; and the Court's Opinion. (BT)

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COURTS in the Classroom

Curriculum Concepts and Other Information on Indiana's Courts for the K-12 Educator

Kirit C. Shah, M.D. v. Stan Harris and Nancy Harris

"Construction of Legal Arguments, Statutes of Limitations, and Medical Malpractice"

Lesson plans for secondary teachers on how lawyers prepare their arguments

2001

SO 034 291

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Kirit C. Shah, M.D. v. Stan Harris and Nancy Harris

Lesson 1: One Case, Two Sides

A lesson plan for secondary teachers on how lawyers prepare their arguments*

*This case was chosen by staff within the judicial branch as a useful tool to teach an interesting aspect of the law. Its selection has no bearing on how the case will ultimately be decided. Since the members of the court did not participate in the preparation of the lesson plan, the issues raised in it will not necessarily be addressed in the oral argument.

Background:

Teachers should ask their students to read the case summary and the briefs of the appellant (the person bringing the case) Kirit C. Shah, M.D. and the appellees (the people who won in the previous court decision) Stan and Nancy Harris. These briefs as well as the video archive of the oral argument before the Indiana Court of Appeals are available online at the Oral Arguments Online page at http://www.in.gov/judiciary/education/lessons/2001/oao.html.

A glossary of legal terms used in this and other Courts in the Classroom lesson plans is available on-line as well.

Learning Objectives:
At the end of this lesson students will be able to:

1. Recognize and discuss how the opposing sides in a lawsuit might use the same cases to support their legal positions.
2. Analyze authors' language that subtly furthers their argument. (In this, lawyers are no different than historians, politicians, journalists, lobbyists, etc.)
3. Locate decisions of the Indiana Supreme Court and the Indiana Court of Appeals either on-line or in a local library.

Online Resources:

Indiana Constitution Article 7 http://www.in.gov/legislative/ic/code/const/art7.html
Indiana Code Title 33 http://www.in.gov/legislative/ic/code/title33/
Indiana's Judicial System http://www.in.gov/judiciary/education/lessons/ijs.html
Chart of the Indiana Court System http://www.in.gov/judiciary/education/chart.html

This lesson plan was written by Elizabeth R. Osborn, Special Assistant to the Chief Justice for Court History and Public Education. If you have any questions about this lesson, or ORAL ARGUMENTS ONLINE, feel free to contact her at (317) 233-8682 or eosborn@courts.state.in.us.

Relevant Cases

Each of the briefs contains a list of cases the attorney feels are important to his or her argument. The two links provided below are for cases quoted extensively. Other Indiana court opinions are available online.

Martin v. Richey, 711 N.E. 2d 1273 (Ind. 1999)
http://www.state.in.us/judiciary/opinions/archive/07089901.mcs.html
Van Dusen v. Stotts, 712 N.E. 2d 491 (Ind. 1999)
http://www.state.in.us/judiciary/opinions/archive/07089902.mcs.html

Learning Activities

1. Ask your class (or groups within the class) to read both the appellant's and appellees' briefs. Ask them to construct a timeline of events for each brief. Do both sides present the same dates? In the same order? Discuss the differences and similarities.

2. After reading each brief, ask students to summarize the primary argument made by each party. How do they differ?

3. Pay special attention to how each author addresses the parties involved. Why might the appellant refer to his client as Dr. Shah, but the appellee refer to him as Kirit Shah, M.D.? Look for other such subtleties of language.

4. Each attorney uses the cases of *Martin v. Richey* and *Van Dusen* v. *Stotts* to make their case. How can this be?

5. Ask students to read the Indiana Supreme Court's decisions in the cases of *Martin v. Richey* and *Van Dusen* v. *Stotts*. Are all of the justices in agreement on the legal issues under review in these cases? Do you think the lawyers have used these cases appropriately in their briefs? [These opinions can be accessed on-line, or the instructor might ask students to go to a local library and locate the bound versions in the reporters. Both the link and the case citation are provided in the "Relevant Cases" section of this lesson plan.]

6. Ask students to follow a similar exercise with a federal case such as *Korematsu v. United States* (1944) [http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/historic/query=%5BGroup+323+U.S.+214:%5D(%5BLevel+Case+Citation:%5D%7C%5BGroup+citemenu:%5D)/doc/%7B@1%7D/hit_headings/words=4/hits_only] or *Bush v. Gore* (2000) [http://supct.law.cornell.edu/supct/html/00-949.ZPC.html]. While the briefs are not readily available on-line, the opinions are. Encourage your students to read the opinions critically. They should carefully examine the language of each author and look for differences and similarities in how members of the Court interpret particular legal information.

For Further Study:

The Legal Information Institute of the Cornell University law school offers an on-line encyclopedia for legal research. http://www.lawschool.cornell.edu/library/encyclopedia/

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The Cornell law school's Legal Information Institute webpages http://www.law.cornell.edu/ also provide links to decisions handed down from the U.S. Supreme Court and the federal courts http://www.law.cornell.edu/federal/opinions.html as well as opinions from state courts around the country http://www.law.cornell.edu/opinions.html. Links to each state's constitution and other related judicial issues can also be accessed from this site.

Related Indiana Social Studies Standards

US History 5.4 and 8.6: Explain the constitutional significance of the following landmark decisions of the United States Supreme Court: *Korematsu v. United States* (1944) and *Bush v. Gore* (2000).

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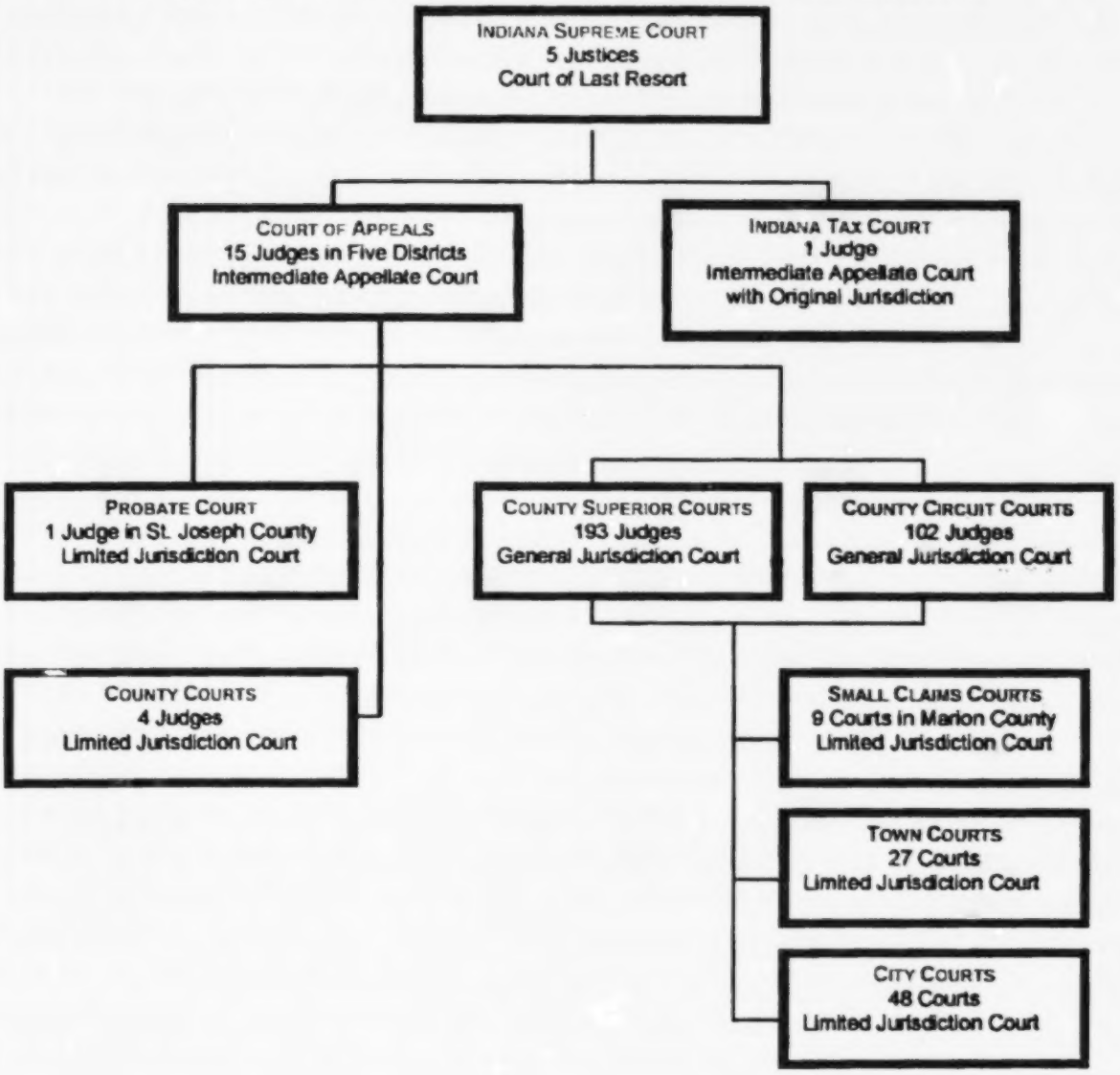
Organizational Chart of the Indiana Judicial System



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www.IN.gov/judiciary/education/

Kirit C. Shah, M.D. v. Stan Harris and Nancy Harris

Lesson 2: How long is too long?

A lesson plan for secondary teachers on the statute of limitations*

*The staff of the judicial branch chose this case as a useful tool to teach an interesting aspect of the law. Its selection has no bearing on how the case will ultimately be decided. Since the members of the court did not participate in the preparation of the lesson plan, the issues raised in it will not necessarily be addressed in the oral argument.

Background:

Teachers should ask their students to read the case summary and the briefs of the appellant (the person bringing the case) Kirit C. Shah, M.D. and the appellees (the people who won in the court decision at the trial court) Stan and Nancy Harris, and watch the October 9, 2001 oral argument before the Indiana Court of Appeals. These materials are available on-line at http://www.in.gov/judiciary/education/oao.html

A separate lesson, giving an overview of the structure of Indiana's court system, is also available to provide students with general information about how the court works.

A glossary of legal terms used in this and other Courts in the Classroom lesson plans is attached and is available on-line as well at http://www.in.gov/judiciary/eduation/glossary.html

Learning Objectives:

At the end of this lesson students should be able to:

1. Understand the legal term statute of limitations and how it varies based on the type of criminal or civil activity under discussion;
2. Discern the applicable statute of limitations given an hypothetical or actual situation;
3. Discuss the possible interpretations of the medical malpractice statute of limitations, based on the information available to them in the Indiana Court of Appeals case of ***Shah v. Harris*** (October 9, 2001).

This lesson plan was written by Elizabeth R. Osborn, Special Assistant to the Chief Justice for Court History and Public Education. If you have any questions about this lesson, or ORAL ARGUMENTS ONLINE, feel free to contact her at (317) 233-8682 or eosborn@courts.state.in.us.

Learning Activities:

1. Using the resources of a local library or the Internet, have students research the legal definition of "statute of limitations." The Find Law website [http://cobrands.smallbiz.findlaw.com/legal/litigation/faq474.html] offers a good basic definition and some hypothetical examples.

2. Ask your students to search the Indiana Code for all mentions of "statute of limitations." (Article 34 sections 11 and 18 are especially helpful - http://www.ai.org/legislative/ic/code/title34/index.html). Have them prepare a list of offenses (burglary, murder, trespassing, medical malpractice, etc.) and the applicable statute of limitations. Are there any offenses that do not have a statute of limitation?

3. Ask your students to search the Indiana Judicial Opinions archives [http://www.in.gov/judiciary/opinions/search.html]for opinions concerning statute of limitations cases. Assign students to read the opinions for several of the cases they find. You might consider choosing cases that cover a range of offenses, or choosing several that deal with the same topic, for example the medical malpractice issue raised in the case *Shah v. Harris*. (In the briefs posted for the Shah case each lawyer also provides a list of cases they draw from while constructing their argument. This will give students an extensive list of cases concerning medical malpractice.)

4. An issue often raised in medical malpractice suits is the constitutionality of denying defendants access to the courts under the two-year statute of limitations. Ask students to read Article I sections 12 and 23 of the Indiana Constitution [http://www.in.gov/legislative/ic/code/const/art1.html] and former Justice Myra Selby's opinion in the case of *Martin v. Richey* [http://www.state.in.us/judiciary/opinions/archive/07089901.mcs.html] as background for discussing this issue.

For Further Study:

Justice Selby, in her *Martin* opinion, explicitly discusses the Indiana Constitution's "privileges and immunities clause" (Article 1 section 23 - http://www.in.gov/legislative/ic/code/const/art1.html). The Court's decision in *Collins v. Day* receives particularly close scrutiny. Teachers wishing to further explore constitutional issues relating to the due process and equal protection clause of the Indiana constitution might consider asking students to read Collins and to search for similar cases in the federal constitution and courts. While *Collins* was decided in 1994, well before we began our online judicial archives, many libraries have subscriptions to Lexis-Nexus, an on-line legal database, and/or the bound Indiana Cases. The appropriate citation for *Collins* in either source is 644 N.E.2d 72 (Ind. 1994).

The Cornell University Legal Institute website is one of many keyword searchable sources for federal opinions [http://www.law.cornell.edu/federal/opinions.html]. The Library of Congress website provides links to the U.S. Constitution [http://lcweb2.loc.gov/const/mdbquery.html] as well as other historical documents relating to the founding era, including the Thomas Jefferson papers.

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The Find Law [http://www.findlaw.com/] website allows interested parties to search any number of legal issues. The site includes links to federal and state statutes and opinions, law schools, legal forms, allows for searches on general legal topics, and so forth.

Related Indiana Social Studies Standards

U.S. Government.1.9: Explain how the rule of law, embodied in a constitution, limits government to protect the rights of individuals.

U.S. Government.1.13: Examine fundamental documents in the American political tradition..., the United States Constitution,...the Indiana Constitutions of 1816 and 1851 to identify key ideas regarding the nature of limited government and the protection of individual rights.

U.S. Government.3.15: Compare core documents associated with the protection of individual rights, including the Northwest Ordinance, the Bill of Rights, the Fourteenth Amendment to the United States Constitution, and Article I of the Indiana Constitution.

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Kirit C. Shah, M.D. v. Stan Harris and Nancy Harris

Lesson 3: Oral Arguments On-Line

A lesson plan for secondary teachers on conducting mock oral arguments*

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Background:

Teachers should ask their students to read the case summary and the briefs of the appellant (the person bringing the case) Kirit C. Shah, M.D. and the appellees (the people who won in the court decision at the trial court) Stan and Nancy Harris, and watch the October 9, 2001 oral argument before the Indiana Court of Appeals. These materials are available on-line at http://www.in.gov/judiciary/education/oao.html.

A glossary of legal terms used in this and other Courts in the Classroom lesson plans is attached and is available on-line as well at http://www.in.gov/judiciary/eduation/glossary.html

Learning Objectives:

At the end of this lesson students should be able to:

1. Conduct a mock oral argument based on the briefs provided and further research as assigned by the instructor;
2. Articulate and differentiate between the arguments made by opposing counsel in an oral argument; and
3. Write an opinion for the case outlining why one legal argument prevailed over the other based on their own reading, research, and viewing of the oral argument.

Learning Activities:

Note: The order of these activities is arbitrary. A teacher might decide to have their class watch the oral argument first, and then conduct a mock hearing, or vice versa. In the event that you would like students to watch another oral argument yet remain unbiased about this case's content, please

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return to the main Courts in the Classroom [http://www.in.gov/judiciary/education/index.html] website to select an appropriate case.

1. Teachers should ask their students to read the case briefs and the case summary for *Shah v. Harris*. Divide the class into several groups: the appellant (Shah), the appellees (Mr. and Mrs. Harris), and the court officers (a bailiff, timer, and a three judge panel). Each group will be assigned the task of preparing for a different part of the oral argument. *Shah* is a Court of Appeals case, thus the reason for the three judge panel instead of the Supreme Court's five judge panel.

2. Students should use the information they have gathered in order to conduct a mock oral argument. (The information provided in Lesson 1 might be helpful for this exercise as well). Those assigned to act as judges should read the briefs and research the cases the attorney's rely on most heavily in the briefs. (Recent Indiana court opinions [http://www.in.gov/judiciary/opinions/archive.html] can be accessed online. Libraries that carry the Indiana Cases volumes will have all Indiana cases.) Students judges might also prepare questions to ask the attorneys. Those acting as attorneys (and their staff of law clerks) should prepare an argument for the court. A judge may interrupt at any time with a question. Some judges are very active questioners, as exemplified by the panel in the *Shah* case.

3. Watch the oral argument in the case of *Shah v. Harris*. Students should take notes on the arguments made by each attorney. How well did they present the information outlined in their briefs? Have they presented any new arguments? Did the judges ask many questions? How would you characterize their questions? Were there issues the judges seemed particularly interested in pursuing?

4. After watching the *Shah* oral argument, or conducting your own mock argument, ask students to write an opinion for the case. You may ask them to write a majority opinion, a concurring opinion, or a dissent. Make sure the students address the specific legal argument under discussion. They should not give their feelings about the case. Instead, they should come to a conclusion based on the facts presented and legal precedents. Recent and current Indiana Supreme Court and Court of Appeals opinions [http://www.in.gov/judiciary/opinions/search.html] are archived on the judiciary website if you wish to provide your students with sample opinions. When this case is decided we will provide a link from the October 2001 Case of the Month.

For Further Study

Oral arguments are heard regularly by the Indiana Supreme Court, the Court of Appeals, and the Tax Court. Teachers might consider bringing a class to tour the State House and to watch an oral argument. To arrange a special tour of the courtroom or to check on upcoming oral arguments please contact Elizabeth Osborn at (317) 233-8682 or eosborn@courts.state.in.us. Guided tours of the State House can be arranged through the tour office at (317) 233-5293 or captours@idoa.state.in.us.

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The legal links [http://www.in.gov/judiciary/research/links.html] menu on the Judicial System's homepage provides a wide variety of resources for students and teachers. From this site teachers can link to opinions handed down by Indiana and federal courts, publications and contact information for local and national bar associations, Indiana law schools, and other sites containing legal resources.

If you are interested in viewing an oral argument from another state Supreme Court consider visiting Florida's court website at http://www.flcourts.org/

Related Indiana Social Studies Standards

U.S. Government.3.6: Explain the functions of the courts of law in governments of the United States and the state of Indiana with emphasis on the principles of judicial review and an independent judiciary.

U.S. Government.1.13: Examine fundamental documents in the American political tradition..., the United States Constitution,...the Indiana Constitutions of 1816 and 1851 to identify key ideas regarding the nature of limited government and the protection of individual rights.

U.S. Government.5.13: Practice civic skills and dispositions by participating in a group of activities such as simulated public hearings, mock trials, and debates.

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Glossary

Alternative Dispute Resolution: a way to settle a case without going to court; sometimes ADR is court ordered. Mediation and arbitration are examples of alternative dispute resolution.

Appeal: a proceeding undertaken by one of the parties in a lawsuit asking to have a decision reconsidered by a higher court or agency.

Appellant: the party who brings the appeal; usually the person who is unhappy with the lower court's decision.

Appellee: the person against whom the appeal is lodged; usually wants the lower court's decision to be upheld.

Bench Trial: a trial in which there is no jury and the judge decides the case.

Civil Suit: a case relating to private rights and remedies that are sought in court. Separate from criminal cases.

Compensatory damages: damages that are awarded to compensate an injured person for the actual (proven) injury or loss. Punitive damages are awarded in addition to actual damages when the intent is to punish the guilty party for an action.

Concurring opinion: an appellate court opinion that agrees with the vote (opinion) of the majority, but for a different reason. The concurring justice(s) write a separate opinion explaining how they reached their decision.

Criminal: a case in connection with the commission of a crime.

Defendant: the person who is charged with a crime (criminal case) or against whom damages are sought (civil case).

Denial of transfer: the court's refusal to grant a request for a motion or petition to "transfer" or take a case from a lower court.

De novo: to begin anew; for example, to have a new trial.

Dissenting opinion: an opinion written by one or more judges who disagree with the majority.

Direct appeal: a case that, if appealed, moves directly from the trial court to the supreme court; it bypasses intermediate appellate courts.

Effective January 1, 2001 the court must take on direct appeal death penalty cases, and they have chosen to allow direct appeals if the sentence was life without parole.

Grand Jury: a group of citizens who decide whether or not there is enough evidence to charge a suspect with a crime.

Interlocutory appeal: an appeal that occurs in the course of a trial; it is made before the trial court reaches a decision. During the interlocutory appeal, the trial is placed on hold so to speak.

Jury: a group of citizens chosen to hear a case and render a verdict based on the facts presented to them. Sometimes referred to as a "petit jury."

Jury Trial: often referred to as "trial by jury," this is a trial in which a jury tries the facts.

Note: The U.S. and Indiana Constitution's are not identical on this issue. The Indiana Constitution (Article 1 section 19) provides for a trial by jury in all criminal cases. Under the U.S. Constitution, however, "The right to a jury trial is established...but it is not an absolute right. The Supreme Court has stated that petty crimes (as those carrying a sentence of up to 6 months) do not require trial by jury. The right to a jury trial in a criminal case may be waived by the ``express and intelligent consent'' of the defendant...There is no right to a jury trial in equity cases. When a civil case involves both legal and equitable issues or procedure, either party may demand a jury trial (and failure to do so is taken as a waiver), but the judge may find that there is no right to jury trial because of equitable issues or claims." [http://www.FindLaw.com/ (choose the legal dictionary)]

Libel: harmful remarks, made in writing, that might injure a person's reputation (could also be in a picture sign, etc.). Slander refers to the same type remarks that are made verbally.

Majority opinion: an opinion that is signed by more then half of the judges considering a case. Sometimes it is called the main opinion.

Medical malpractice: a case involving a doctor's alleged failure to provide care at an acceptable level.

Opinion: a court's written explanation of its decision in a case. Not all opinions, however, are published.

Non-published opinions may be requested by contacting the Clerk's Office at (317) 232-1930. Published opinions for recent Indiana Court

of Appeals and Supreme Court cases can be found online at http://www.in.gov/judiciary/opinions/.

There are different types of opinions issued by the court, see also concurrent, dissenting and majority opinion.

Oral arguments: the presentation of information before an appellate court. Either the appellants or the appellees may request to make oral arguments before the court. The court does not have to agree to hear oral arguments; they may feel that the written record is sufficient. On the other hand, they may request that the representatives of each party present oral arguments.

Peremptory Challenge: a request by an attorney for either side to disqualify a juror; the attorney does not have to give a reason for his request. The number of peremptory challenges varies depending on the kind of case. Attorneys are also allowed to request that a juror be dismissed for cause. In a challenge for cause the attorney argues that the juror would not be able carry out his/her duties for some reason specified by the attorney.

Petition: a formal written request made to a court.

Petition to transfer: a request to the court, asking them to accept jurisdiction over a case.

Petit Jury: *see* jury

Plaintiff: The person who initiates a civil lawsuit.

Post-conviction relief: a request by a prisoner asking the court to nullify, cancel or correct a sentence.

Prosecution: in criminal cases it is the state (government) that initiates the case; they are referred to as the prosecution. In a civil case the person who initiates the case is called the plaintiff.

Punitive damages: punitive damages are awarded in addition to actual damages when the intent is to punish the guilty party for an action. They are generally awarded when it has been determined that the defendant acted with recklessness, malice, or deceit.

Remit: the court's reduction of the damages awarded in a jury trial.

Slander: harmful remarks that might injure a person's reputation that are made verbally. Libel refers to similar remarks that are made in writing, pictures, etc.

Statute of limitations: a legally established time limit (based on the date of the claim for civil cases or the crime for criminal cases) for entering a suit (civil) or beginning a prosecution (criminal). A reasonable time limit is established so that the defendant may still be able to find witnesses, evidence, etc. pertinent to the case.

Summary judgment: a judgment issued by a judge where there is agreement about a set of relevant facts. It is a procedural device that allows for the speedy resolution of some controversies without the need for a trial.

Toll: to stop the running of time, especially regarding time allowed before filing a lawsuit. See, statute of limitations.

Tort: a civil wrong; the remedy that is sought is usually a monetary award for damages

*This glossary is provided to help teachers and students gain a working knowledge of some of the terms used in our lesson plans; it is not intended to be a comprehensive legal dictionary.

The Find Law legal website is an invaluable tool for all people working with the law (http://www.findlaw.com/). The Find Law site includes access to a legal dictionary (http://dictionary.lp.findlaw.com/).

Voir Dire: the act or process of questioning prospective jurors, by the trial counsel or the trial judge, to determine which are qualified for service on a jury.

Case Summary: Shah v. Harris

Webcast Oral Argument

Dr. Shah, a neurologist, began treating Mr. Harris in June 1991. In July 1991, Dr. Shah diagnosed Mr. Harris with multiple sclerosis. Dr. Shah treated Mr. Harris for this diagnosis until April 1993, at which point in time Dr. Shah moved away from the area. Mr. Harris subsequently sought treatment from other physicians for multiple sclerosis until, he alleges, he was correctly diagnosed with a vitamin B-12 deficiency in July 1998.

In July 2000, Mr. Harris and his wife filed a medical malpractice complaint against Dr. Shah with the Indiana Department of Insurance and the Vanderburgh Circuit Court alleging that Dr. Shah was negligent in diagnosing Mr. Harris. Dr. Shah filed a Motion for Summary Judgment arguing that the Harris' failed to file their complaint before the expiration of the two-year statute of limitations, which Dr. Shah argues was in April of 1995, two years after Dr. Shah and Mr. Harris ended their physician-patient relationship. The Harris' responded that they timely filed their medical malpractice complaint because they filed within two years of the first date upon which they could have known of Dr. Shah's alleged misdiagnosis. The trial court denied Dr. Shah's motion and he has appealed to the Indiana Court of Appeals.

Shah v. Harris considers the issue of when a Medical Malpractice complaint is timely filed under the Indiana Medical Malpractice Statute of Limitations, Indiana Code section 34-18-7-1. The oral argument will discuss that statute and the cases from the Court of Appeals and Supreme Court which have considered the statute under unique factual circumstances.

IN THE INDIANA COURT OF APPEALS
CASE NO.: 82A02-0103-CV-111

KIRIT C. SHAH, M.D.,	)	Permissive Interlocutory Appeal From
	)	The Vanderburgh Circuit Court
Appellant,	)	
	)	Trial Court Case No.:
vs.	)	82C01-0007-CT-357
	)	
STAN HARRIS AND NANCY HARRIS	)	The Honorable
	)	Carl A. Heldt, Judge
Appellees,	)	
	)	

BRIEF OF THE APPELLEES STAN AND NANCY HARRIS

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IN THE INDIANA COURT OF APPEALS
CASE NO.: 82A02-0103-CV-111

KIRIT C. SHAH, M.D.,	)	Permissive Interlocutory Appeal From
	)	The Vanderburgh Circuit Court
Appellant,	)	
	)	Trial Court Case No.:
vs.	)	82C01-0007-CT-357
	)	
STAN HARRIS AND NANCY HARRIS	)	The Honorable
	)	Carl A. Heldt, Judge
Appellees,	)	
	)	

BRIEF OF THE APPELLEES STAN AND NANCY HARRIS

III. STATEMENT OF ISSUE

Whether the appellant (Kirit C. Shah. M.D.) has met the burden that the trial court erred when it denied his Motion for Summary Judgment on the basis that there is a genuine issue of material fact with regard to when the appellees (Harrises) discovered the alleged malpractice and resulting injury or facts, that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and resulting injury in following the precedence of Van Dusen v. Stotts, 712 N.E.2d 491 (Ind. 1999); and further, the ruling of the trial court that Harris may, indeed have filed their complaint within the two years after said discovery and therefore within the statute of limitations as set forth in Van Dusen; and with that fact undecided, whether Kirit C. Shah's M.D.'s Motion for Summary Judgment was properly denied?

IV. STATEMENT OF THE CASE

Stan and Nancy Harris, by counsel, Glenn A. Deig, filed their Proposed Complaint with the Indiana Department of Insurance and their Complaint for Damages in the Vanderburgh Circuit Court on July 24, 2000 alleging the medical acts and omissions of Kirit C. Shah, M.D. were negligent and a proximate cause of their damages. By subsequent letter, the Indiana Department of Insurance informed Stan and Nancy Harris that Kirit C. Shah, M.D. was a qualified healthcare provider. The parties, by counsel, agreed to Paul Black as Panel Chairman and were in the process of selecting the remaining Medical Review Panel.

On October 10, 2000, the defendant, Kirit C. Shah, M.D. by counsel, A.J. Manion, and Stan and Nancy Harris, by counsel, Glenn A. Deig, met with the court and indicated that this matter was before the Medical Review Panel and by agreement, a status conference was reset until October 20, 2001.

On December 14, 2000, the defendant, Kirit C. Shah, M.D. by counsel, Rebecca Kasha and A.J. Manion filed Defendant's Motion for Summary Judgment, Defendant's Designation of Materials in Support of Motion for Summary Judgment, Memorandum of Law in Support of Motion for Summary Judgment, and Proposed Order of Summary Judgment. The Plaintiffs, Stan and Nancy Harris, by counsel, Glenn A. Deig, filed their Reply Brief of Plaintiffs in Opposition to Defendant Kirit C. Shah, M.D.'s Motion for Summary Judgment on January 16, 2001. On January 25, 2001, the Defendant, Kirit C. Shah, M.D. by counsel filed his Reply Memorandum. On January 30, 2001, the plaintiffs by counsel, Glenn A Deig; and defendant, by A.J. Manion, and the court by Judge Carl Heldt met for a hearing on Defendant's Motion for Summary Judgment. After considering the arguments and written materials submitted by the

parties, the court entered a minute entry which denied defendant's Motion for Summary Judgment, which was later amended on February 7, 2001 to read as follows:

> THE COURT HEREBY AMENDS ITS MINUTE OF 1/30/01 TO READ AS FOLLOWS: PLAINTIFFS BY GLENN DEIG, DEFT. BY A.J. MANION. HEARING HELD ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, COURT FINDS THAT A MATERIAL ISSUE OF FACT EXISTS WITH REGARD TO WHEN THE PLAINTIFFS DISCOVERED THE ALLEGED MALPRACTICE AND RESULTING INJURY OR FACTS THAT, IN THE EXERCISE OF REASONABLE DILIGENCE, SHOULD HAVE LED TO THE DISCOVERY OF THE ALLEGED MALPRACTICE AND RESULTING INJURY. CONSEQUENTLY, IN ACCORDANCE WITH VAN DUSEN VS. STOTTS, 712 N.E.2D 491 (IND. 1999), THE PLAINTIFFS MAY, INDEED, HAVE FILED THEIR COMPLAINT WITHIN TWO YEARS AFTER SAID DISCOVERY AND THEREFORE WITHIN THE STATUTE OF LIMITATIONS AS SET FORTH IN VAN DUSEN. WITH THAT ISSUE OF FACT UNDECIDED, THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS DENIED.

On February 9, 2001, the Defendant, Kirit C. Shah, M.D. by counsel, filed his Petition to Certify for Interlocutory Appeal. On February 15, 2001, the Defendant's Petition to Certify for Interlocutory Appeal was Granted. On April 6, 2001, the Clerk of the Court of Appeals filed an Order that the Appellant's Petition for Leave to File Permissive Interlocutory Appeal was granted, and this court now accepted jurisdiction of this Appeal, pursuant to Appellate Rule 14B; counsel were advised that this appeal shall proceed under the 2001 version of the Appellate Rule 14B. On April 16, 2001, the defendant, Kirit C. Shah, M.D. by counsel, Rebecca Kasha filed his Notice of Appeal. On April 25, 2001, Notice of Completion of Clerk's Record was sent to Court of Appeals and all parties of record.

V. STATEMENT OF FACTS

Stan Harris was first treated by the defendant, Kirit C. Shah, M.D., a neurologist on June 20, 1991. (Appellant's App. P7, Complaint ¶3) On or about July 11, 1991, Kirit C. Shah, M.D. diagnosed Stan Harris as having multiple sclerosis. (Appellant's App. P. 7, Complaint., ¶ 4.) Stan Harris was last treated by the defendant Kirit C. Shah, M.D. on April 12, 1993. (Appellant's App. P. 7, Complaint ¶3.) On or about July 31st, 1998, another physician diagnosed Stan Harris as suffering from a vitamin B-12 deficiency, and not from multiple sclerosis. Stan Harris first learned that he did not have multiple sclerosis and the diagnosis and care and treatment by Kirit C. Shah, M.D. was below the appropriate standard of care. (Appellant's App. P. 7, Complaint ¶5).

Stan Harris, along with his wife, Nancy Harris, simultaneously double-filed on July 24, 2000 a Proposed Complaint with the Indiana Department of Insurance, and a Complaint for Damages in the Vanderburgh Circuit Court alleging that the defendant had negligently misdiagnosed him as having multiple sclerosis and as a proximate result, incurred damages. The Indiana Department of Insurance later informed Stan and Nancy Harris by standard notification letter that Kirit C. Shah, M.D. was a qualified healthcare provider under the Indiana Medical Malpractice Act.

VI. SUMMARY OF ARGUMENT

Summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. At the trial court level, the appellant Kirit C. Shah's, M.D.'s Motion for Summary Judgment was properly denied since the trial court found the existence of genuine issue of material facts that precluded summary judgment. On

appeal, evidentiary material should be construed in the light most favorable to the Harrises. Further, the moving party, Kirit C. Shah. M.D. has the burden of persuading this appellate court that the lower trial court erred.

Indiana case law strongly supports the position of the Harrises. The Indiana courts have consistently held that it would be an unconstitutional application of the statute of limitations to prevent plaintiffs, such as the Harrises, from filing their claim, before plaintiffs either know of the malpractice and resulting injury, or discover facts, which in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury. The undisputed facts are that the Harrises could not have discovered the malpractice and the resulting injury until more than two (2) years after the occurrence of the alleged malpractice. Under these circumstances, the decisions of the appellate courts have all held that the plaintiffs would have two (2) years from this discovery to file their claim. The Harrises did so, and their claim was properly filed.

The Indiana cases and argument of Kirit C. Shah, M.D. are without merit. The cases cited by Kirit C. Shah M.D. which addressed the situation when the plaintiffs discover the malpractice and injury well within the original two (2) year period and fail to file their complaint within the remaining time left do not apply to the Harris' claim. Also, the argument, and cases cited by Kirit C. Shah, M.D. regarding the doctrines of fraudulent concealment and tolling are not applicable to this case since the Harrises did not raise or argue these doctrines since they are not applicable. Consequently, the argument that the Harrises had only a "reasonable" amount of time, rather than a full two (2) years, after discovery of the potential malpractice claim, completely disregards the current law in the State of Indiana.

This appellate court should affirm the decision of the trial court in denying Kirit C. Shah,

M.D.'s Motion for Summary Judgment.

VII. ARGUMENT

A. Standard of Review

Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). Relying upon specifically designated evidence, the moving party (Kirit C. Shah, M.D.) bears the burden of showing that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. Estate of Pflanz v. Davis, 678 N.E.2d 1148, 1150 (Ind. Ct. App. 1997). If the moving party (Kirit C. Shah, M.D.) meets these two requirements, the burden then shifts to the non-movant (Harrises) to set forth specifically designated facts showing that there is a genuine issue for trial. Id. A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue. Downs v. Panhandle Eastern Pipeline Co., 694 N.E.2d 1198, 1200 (Ind. Ct. App. 1998), trans. denied, 706 N.E.2d 178.

On appeal, this Court is bound by the same standard as the trial court, and should consider only those matters which were designated to the trial court. Pflanz, 678 N.E.2d at 1151. The designated evidentiary material should be construed in the light most favorable to the non-moving party (Harrises) to determine whether there is a genuine issue of material fact. Id. Kirit C. Shah, M.D., the party that lost in the trial court, has the burden of persuading the appellate court that the trial court erred. Id

B. Discussion

Kirit C. Shah, M.D. erroneously agues that Van Dusen v. Stotts, 712 NE 2d 491 (Ind. 1999), Martin v. Richey, 711 NE 2d 1273 (Ind. 1999), and the subsequent cases that followed these seminal cases do not apply to the facts before this Court today. The companion cases of Van Dusen v. Stotts, 712 NE 2d 491 (Ind. 1999) and Martin v. Richey, 711 NE 2d 1273 (Ind.

1999), hold that the Indiana Medical Malpractice Act, specifically Indiana Code §34-18-7-1 (b) permit the plaintiffs to file their claims within two (2) years of the date when they discovered the malpractice and the resulting injury or facts that, and exercise reasonable diligence, should lead to the discovery of the malpractice and the resulting injury when original discovery of the alleged negligence is made beyond the original two (2) year time limitations.

The Van Dusen court explained, in detail, discussing Martin v. Richey, 711 N.E.2d 1273 (Ind. 1999):

> Specifically, we held in Martin that, under Article I, Section 12, the two-year occurrence-based statute of limitations may not constitutionally be applied to preclude the filing of a claim before a plaintiff either knows of the malpractice and resulting injury, or discovers facts, which in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury. To do so would be to impose an impossible condition on her access to the courts and pursuit of their tort remedy. Van Dusen at 493.

The Van Dusen Court rejected the defendant's argument that plaintiffs should only have a "reasonable amount of time" to file their claims, as in fraudulent concealment cases, but the full two-year statute of limitations will be triggered upon discovery of the alleged negligence.

The Van Dusen Court explained that it would do violence to the Indiana Constitution, particularly access to the courts, if the legislature intended to create a statute of limitations that always runs from the date of the occurrence of the alleged negligent act, even when the malpractice and resulting injury cannot be discovered during the limitations period given the nature of the asserted malpractice and the medical condition. Id at 496. Likewise, in Martin v. Richey 711 N.E.2d 1273 (Ind. 1999) the Indiana Supreme Court held that the statute of limitations is unconstitutional as applied to the plaintiff in that case because it requires the plaintiff to file a claim before she is able to discover the alleged malpractice and her resulting injury, and therefore, it imposes an impossible condition on her access to the courts and pursuit of her tort remedy.

These cases do not hinge on the question of when the disease and its symptoms

manifested itself, or as Kirit C. Shah, M.D. incorrectly labels it ("latency exception"); but when a plaintiff either knows of the malpractice and resulting injury, or discovers facts, which in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury. In the Harris' situation, they discovered that Stan Harris did not have multiple sclerosis when he was finally properly diagnosed with a vitamin B-12 deficiency on July 31, 1998. The Harrises did not know, nor could have known of their potential claim until July 31st, 1998. Under the Martin and Van Dusen cases, the Harrises two full years to file suit since discovery occurred outside the original two year period. Consequently, the Harrises had until July 31st, 2000 to have filed suit. They did so on July 24, 2000 which is within the two year time limitations and timely under current Indiana law.

Further, the position of Kirit C. Shah, M.D. that discovery of a cause of action is not relevant to the issues before this court today, is clearly incorrect and is not supported by the facts of this case. This completely disregards the discussion of Van Dusen where the court looked in Indiana cases in the area of product liability statutes of limitations and other tort claims for guidance of *when* discovery by a plaintiff triggers the time running to file his claim. Van Dusen at 497.

In addition, the arguments by Kirit C. Shah, M.D. regarding the tolling of limitations period by fraudulent concealment or equitable tolling was not raised, or argued, by the Harrises before the lower trial court since these doctrines are inapplicable to this case. The position of Kirit C. Shah, M.D. that the Harrises only had a "reasonable" amount of time after they discovered the potential malpractice (rather than 2 years) under the facts of this case directly contradicts the current law as espoused by Van Dusen, Martin, and their progeny.

There are several other Indiana cases that support of the position of the Harrises. The first relevant case is Ling, et. al. v. Board of Trustees of Vermillion County Hospital v. Stillwell, et. al., 732 N.E.2d 1270, (Ind. App. 2000). In the Stillwell case, the patient Doris Stillwell died while a patient of the Vermillion County Hospital and under the care of an employee nurse. A criminal

investigation started in March of 1995 due to the epidemic level of mortality at the hospital. There were several newspaper and news accounts of the investigation into the deaths before the two (2) year period from her death; but Stillwell had no reason to suspect that his mother's death had been involved in the nurses' criminal activity. In July 1997, Stillwell became aware of the circumstances surrounding her death and was part of the investigation. After becoming aware of these facts in July 1997, Stillwell filed a proposed complaint on September 5, 1997. The Hospital filed a Motion for Summary Judgment that the complaint was not timely filed within the statute of limitations since the complaint was not filed on or before August 1st, 1996, two years from her date of death and he was aware of the potential claim within the original two (2) year statute of limitations but failed to file the claim. The appellate court held that under the circumstances of this case, it would unconstitutionally deprive the claimant of a medical malpractice claim for her death. The court explained that even though the claimants were technically aware of the ultimate injury, the death, on August 1, 1994, the claimants had no reason to know that it was the result of possible malpractice until after the limitations period had passed. Following the reasoning as espoused in the Martin case, the appellate court upheld and affirmed the decision of the trial court in denying the Motion for Summary Judgment filed by the hospital.

Again, in Weinberg v. Bess, 717 N.E.2d 584 (Ind. 1999) and Halbe v. Weinberg, 717 N.E.2d 876 (Ind. 1999) two female patients were both falsely informed by the physician or his agents that their breast implants that were surgically implanted by this physician contained little or no silicone. The patients obtained their medical records and first became aware that their implants contained silicone. The Halbe court explained:

> We reverse the trial court's grant of summary judgment in favor of Defendant in light of our holding in Martin v. Richey, 711 N.E.2d 1273 (1999), which established that the two-year medical malpractice statute of limitations is unconstitutional as applied to plaintiffs who are unable to discover their medical malpractice claims before the expiration of the limitations period. Even with the exercise of reasonable diligence, Halbe would not have discovered, and indeed did not discover, her medical malpractice until February 1992. On April 20, 1992, two months after she learned her breast implants contained silicone, she filed suit against Dr. Weinberg. Thus, her claim was filed within the statutory period of two

years. Id at 890.

The Halbe court further explained that "under Martin, a plaintiff need not possess the prescience to file a claim before he or she knows or has reason to know a claim exists." Id at 891.

The only exception in current law established by Martin and Van Dusen is the situation when the plaintiff discovers the alleged negligence **before** the original statute of limitations had run. In Boggs v. Tri-State Radiology, Inc. 730 N.E.2d 692 (Ind. 2000), the court held that the patient who discovered the injury and alleged negligence eleven (11) months before the expiration of the original statute of limitations could, and should, have proceeded to Court within this time since it did not shorten the window of time so unreasonably as to make filing of the claim impractical. Clearly, the facts and law of the Boggs case do not apply since Stan Harris did not discover or could have known about the negligence and the injury until **after** the running of the original time limitations under any theory or argument.

Likewise, in the case of Coffer v. Arndt, 732 N.E.2d 815 (Ind. Ap. 2000) a patient was treated by an optometrist for eye examinations up through September or October of 1995. The patient was referred to an ophthalmologist on November 14, 1995 and was diagnosed by another ophthalmologist that the patient had glaucoma on December 19, 1995, and had it for several years while under the treatment of the defendant-optometrist. Like the Boggs case, the appellate court held that when he found out on December 19, 1995 that he had knowledge of facts that led, or should have led to the discovery of the alleged malpractice, he had twenty-two months remaining from the "occurrence" of the malpractice which was a reasonable amount of time left to have filed his claim. The Boggs and Coffer cases are clearly distinguishable from the facts of this case because the Harrises submitted evidence that they did not have knowledge, nor could have reasonably discovered, the alleged malpractice by Kirit C. Shah, M.D., within the two (2) years statute of limitations that were applicable which existed in the Boggs and Coffer cases.

In the case before the court today, it is agreed by the parties to this action, that the plaintiffs, Stan and Nancy Harris, did not discover, or could not have known of defendant's

misdiagnosis and the resultant injury, until July 31st, 1998 which is after two (2) years from when Stan Harris was last treated, and misdiagnosed, by the defendant, Dr. Shah, M.D. Consequently, following the law as originally espoused in the Van Dusen and Martin cases, the plaintiffs in this case would have the full two (2) year time limitation to file suit (**July 31st, 2000**). The plaintiffs did file within two (2) years of discovery when they timely filed their claims on **July 24, 2000**.

VIII. CONCLUSION

The lower trial court properly found that a genuine issue of material fact existed that precluded summary judgment. The appellant, Kirit C. Shah, M.D. has failed to meet his burden that the trial court erred. Under current Indiana law, the Harrises had a full two (2) years from discovery of their claim to file their claim. The Harrises met this requirement and their claim should proceed.

WHEREFORE, the Harrises respectfully request that this Appellate Court affirm the trial court in denying the Kirit C. Shah, M.D.'s Motion for Summary Judgment.

Respectfully submitted,

Glenn A. Deig, Esquire
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ATTORNEY FOR APPELLEES

I hereby certify that this brief contains less than 14,000 words.

Glenn A. Deig, Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have **HAND SERVED** a copy of the foregoing Brief of Appellees upon the attorney (or her agent) for the appellant, on the 21st day of June 2001.

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IN THE

INDIANA COURT OF APPEALS

CASE NO. 82A01-0103-CV-111

KIRIT C. SHAH, M.D.,	)	Permissive Interlocutory Appeal
	)	From the Vanderburgh Circuit Court
Appellant,	)	
(Defendant Below)	)	
	)	
vs.	)	Trial Court Cause No. 82C01-0007-CT-357
	)	
STAN HARRIS and NANCY HARRIS,	)	The Honorable Carl A. Heldt, Judge
	)	
Appellees,	)	
(Plaintiffs Below)	)	

BRIEF OF APPELLANT KIRIT C. SHAH, M.D.

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B. The Trial Court erroneously applied the judicially-created exception to the applicable statute of limitations first recognized in *Martin vs. Richey*, 711 N.E. 2d 1273, 1284-85 (Ind. 1999) and *Van Dusen vs. Stotts*, 712 N.E. 2d 491, 493 (Ind. 1999). 6

C. The Trial Court erroneously tolled the statute of limitations past the cessation of the physician-patient relationship. 15

D. The Trial Court erroneously failed to require Plaintiffs-Appellees to initiate their cause of action within the "reasonable period" required by Indiana Courts. 17

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III. Statement of Issues

A. Whether the Trial Court erroneously converted the applicable occurrence-based statute of limitations to a discovery-based statute of limitations.

B. Whether the Trial Court erroneously applied the judicially-created exception to the statute of limitations first recognized in *Martin vs. Richey*, 711 N.E. 2d 1273, 1284-85 (Ind. 1999) and *Van Dusen vs. Stotts*, 712 N.E. 2d 491, 493 (Ind. 1999).

C. Whether the Trial Court erroneously tolled the statute of limitations past the cessation of the physician-patient relationship.

D. Whether the Trial Court erroneously failed to require Plaintiffs-Appellees to initiate their cause of action within the "reasonable period" required by Indiana Courts.

IV. Statement of Case

This is a permissive appeal from an interlocutory order in a medical malpractice case.

In July of 1991, Dr. Shah diagnosed Stanley Harris with multiple sclerosis. (Appellant's App. P. 7, Complaint paragraph 4, hereinafter "Compl., ¶ __".) Mr. Harris continued receiving medical care from Dr. Shah until 1993. (Appellant's App. P. 10, Admission Number 1.) On or about July 31, 1998, a different doctor diagnosed Mr. Harris as suffering from a vitamin B-12 deficiency, rather than multiple sclerosis. (Appellant's App. P. 7, Compl., ¶ 5.)

Mr. Harris and his wife initiated this cause of action against Dr. Shah on July 24, 2000, (Appellant's App. P. 7, Compl. ¶6), just one week shy of two years from the date of the vitamin B-12 deficiency diagnosis, and more than nine years after the multiple sclerosis diagnosis. A medical malpractice action in Indiana is governed by a two-year statute of limitations. Because Mr. and Mrs. Harris failed to bring their action against Dr. Shah within this two year period, Dr. Shah filed a motion for summary judgment. (Appellant's App. P. 14, Defendant's Motion for Summary Judgment.) The Trial Court denied the motion for summary judgment after oral arguments on

January 30, 2001. (Appellant's App. P. 3, Court's Entry for January 30, 2001.) The Trial Court, *sua sponte*, amended its entry on February 7, 2001. The amended entry states as follows:

> The Court hereby amends its minute of 1/30/01 to read as follows: Plaintiffs by Glenn Deig; Deft. by A.J. Manion. Hearing held on Defendant's motion for summary judgment. Court finds that a material issue of fact exists with regard to when the Plaintiffs discovered the alleged malpractice and resulting injury or facts that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and resulting injury. Consequently, in accordance with *Van Dusen v. Stotts*, 712 N.E.2d 491 (Ind. 1999), the Plaintiffs may, indeed, have filed their complaint within two years after said discovery and therefore within the statute of limitations as set forth in *Van Dusen*. With that issue of fact undecided, the Defendant's motion for summary judgment is denied.

(Appellant's App. P. 6, Court's Entry for February 7, 2001.) On February 9, 2001, Dr. Shah requested the Trial Court certify its entry of February 7, 2001 for interlocutory appeal. (Appellant's App. P. 44, Petition to Certify). On February 15, 2001, that motion was granted. (Appellant's App. P. 46, Trial Court's Minute granting Petition to Certify For Interlocutory Appeal). Dr. Shah moved this Court for permission to bring this appeal pursuant to Rule 14(B) of the Indiana Rules of Appellate Procedure on February 28, 2001, and that motion was granted on April 2, 2001. Dr. Shah filed his Notice of Appeal with the Trial Court on April 16, 2001.

V. Statement of Facts

Dr. Kirit C. Shah is a neurologist. (Appellant's App. P. 7, Compl. ¶ 2). At all relevant times, Dr. Shah was a qualified healthcare provider under Indiana's Medical Malpractice Act, (I.C. 34-18-1-1, *et seq.)* (Appellant's App. P. 7, Compl., ¶ 2.) From June 20, 1991, until April 12, 1993, Mr. Stanley Harris was under the care and treatment of Dr. Shah. (Appellant's App. P. 7, Compl., ¶ 3; Appellant's App. P. 10 Admission No. 1.) On or about July 11, 1991, Dr. Shah diagnosed Mr. Harris as having multiple sclerosis. (Appellant's App. P. 7, Compl., ¶ 4.) Mr. Harris was last seen

by Dr. Shah on April 12, 1993. (Appellant's App. P. 10, Admission No 1.) After Mr. Harris last saw Dr. Shah, Mr. Harris sought medical care from other physicians. (Appellant's App. PP. 10-11, Admission Nos. 2- 4.) On or about July 31, 1998, one of Mr. Harris' subsequent treating physicians diagnosed Mr. Harris as suffering from a vitamin B-12 deficiency, and not from multiple sclerosis. (Appellant's App. P. 7, Compl., ¶ 5.) Mr. and Mrs. Harris initiated this cause of action on July 24, 2000, claiming Dr. Shah's care and treatment of Mr. Harris, from June of 1991 to April of 1993, was negligent and below the applicable standard of care. (Appellant's App. P. 7, Compl., ¶ 6.)

VI. Summary of the Argument

A. The Trial Court erroneously converted the applicable occurrence-based statute of limitations to a discovery-based statute of limitations.

The statute of limitations requires that claims be filed within two years after the date of the alleged act, omission or neglect. I.C. § 34-18-7-1(b) (1998). The act, omission or neglect in this instance occurred, at the latest, April 12, 1993. Mr. and Mrs. Harris failed to file their complaint within two years of April 12, 1993, thus their claim was untimely. Rather than recognize the statute as occurrence-based, the Trial Court denied summary judgment holding there was an issue of fact whether Mr. and Mrs. Harris filed their claim within two years of discovery of the alleged malpractice. Harris' discovery is irrelevant under the occurrence-based statute of limitations, thus the Trial Court's ruling is erroneous.

B. The Trial Court erroneously applied the judicially-created exception to the statute of limitations recognized in *Martin vs. Richey*, 711 N.E. 2d 1273, 1284-85 (Ind. 1999) and *Van Dusen vs. Stotts*, 712 N.E. 2d 491, 493 (Ind. 1999).

The Indiana Supreme Court has created an exception to the two year occurrence-based statute of limitations. *Martin vs. Richey*, 711 N.E. 2d 1273, 1284-85 (Ind. 1999) and *Van Dusen vs. Stotts*,

712 N.E. 2d 491, 493 (Ind. 1999). This exception was applied because the plaintiffs suffered from diseases with long latency periods and, therefore, their conditions were not known or could not be known through the exercise of reasonable diligence prior to the expiration of the statute of limitations. Contrary to the facts of *Martin vs. Richey* and *Van Dusen vs. Stotts*, Mr. Harris did not suffer from a disease with a long latency period. Rather, Mr. Harris originally presented to Dr. Shah with a manifest medical condition, and after he last saw Dr. Shah in 1993, he presented to several subsequent treating physicians with a manifest medical condition. Mr. Harris, therefore, cannot claim he was unaware of his condition such that the latency exception would apply.

C. The Trial Court erroneously tolled the statute of limitations past the cessation of the physician-patient relationship.

Even if the latency exception recognized in *Martin vs. Richey* and *Van Dusen vs. Stotts* is applicable to the present case, this exception should not toll the limitations period past the end of the physician-patient relationship. Other than the latency exception, there are only two other means to toll the medical malpractice statute of limitations: the continuing wrong doctrine and the doctrine of fraudulent concealment. Mr. and Mrs. Harris do not avail themselves of either doctrine, but it is relevant to note that Indiana Courts have refused to toll the limitations period under those doctrines past the end of the physician-patient relationship. This Court should follow the logic of those earlier decisions and refuse to toll the statute of limitations, pursuant to the latency exception, past the end of the physician-patient relationship.

D. The Trial Court erroneously failed to require Plaintiffs-Appellees to initiate their cause of action within the "reasonable period" required by Indiana Courts.

Indiana law requires that a medical malpractice plaintiff initiate his cause of action within two years from the date of the occurrence, except where certain tolling doctrines are utilized; and then, the plaintiff must bring his action within a reasonable period. Indiana Courts have rejected delays ranging from 14 months to 23 months as unreasonable. In this case, the alleged malpractice was "discovered" more than five years after the latest possible occurrence. Rather than proceed directly to Court, however, Mr. and Mrs. Harris waited 23¾ months before bringing their claim. As such, their delay was unreasonable as a matter of law and should be dismissed as time-barred.

VII. Argument

A. The Trial Court erroneously converted the applicable occurrence-based statute of limitations to a discovery-based statute of limitations.

Standard of Review

When reviewing a grant or denial of summary judgment, the standard of review is the same as it is for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. *Indiana University Medical Center vs. Logan*, 728 N.E. 2d 855, 858 (Ind. 2000).

Discussion

Indiana's medical malpractice statute of limitations requires that claims be filed within two years after the date of the alleged act, omission or neglect. I.C. § 34-18-7-1(b) (1998). This statute, by its terms, is an "occurrence" rather than "discovery" statute. *See Id.* Plaintiffs' Complaint claims the relevant "act, omission or neglect" occurred on July 11, 1991, (Appellant's App. P. 7, Compl.

¶ 4). Thus, the applicable statute of limitations ran on July 11, 1993. *See* I.C. § 34-18-7-1(b) (1998). Given that this action was commenced on July 24, 2000, it is seven years too late.

Despite the clear language of the governing statute and the undisputed date of the alleged malpractice, the Trial Court looked not to the date of the relevant "act, omission or neglect," I.C. § 34-18-7-1, but to the potential discovery of such act or omission. In its amended entry denying summary judgment, the Trial Court stated that a "material issue of fact exists with regard to when the plaintiffs *discovered* the alleged malpractice and resulting injury or facts that, in the exercise of reasonable diligence, should have led to the *discovery* of the alleged malpractice and resulting injury." (Appellant's App. P. 6, Amended Trial Court Entry, emphasis supplied.)

The governing statute of limitations is an occurrence-based statute. *See* I.C. § 34-18-7-1. Rather than employ the statute of limitations as occurrence-based, however, the Trial Court's holding hinges on the time of discovery. The Trial Court's ruling, therefore, is contrary to existing case law and should be reversed.

B. The Trial Court erroneously applied the judicially-created exception to the applicable statute of limitations recognized in *Martin vs. Richey*, 711 N.E. 2d 1273, 1284-85 (Ind. 1999) and *Van Dusen vs. Stotts*, 712 N.E. 2d 491, 493 (Ind. 1999).

Standard of Review

When reviewing a grant or denial of summary judgment, the standard of review is the same as it is for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. *Indiana University Medical Center vs. Logan*, 728 N.E. 2d 855, 858 (Ind. 2000).

Discussion

The governing medical malpractice statute of limitations is an occurrence-based, rather than discovery-based, statute. I.C. § 34-18-7-1(b) (1998). The Indiana Supreme Court, however, has created an exception which was erroneously applied by the Trial Court in denying Dr. Shah's Motion for Summary Judgment. In *Martin vs. Richey*, 711 N.E. 2d 1273, 1284-85 (Ind. 1999) and *Van Dusen vs. Stotts*, 712 N.E. 2d 491, 493 (Ind. 1999), the Indiana Supreme Court ruled the medical malpractice statute of limitations was unconstitutional *as applied* where plaintiffs were barred from pursuing an otherwise valid malpractice claim before they knew of, or had reason to know of, that claim. This so-called "latency exception" cannot be applied to the Harris' action against Dr. Shah.

1. *Martin vs. Richey* and *Van Dusen vs. Stotts* are limited to diseases with long latency periods

In *Martin,* the plaintiff, Melody Martin, first learned that she suffered from breast cancer approximately 30 months after Dr. Richey did a needle aspiration and told her she was fine. Despite the delinquent filing, the Court declined to dismiss Ms. Martin's claims because "the statute precludes [her] from pursuing a claim against her doctor because she has a disease which has a long latency period and which may not manifest significant pain or symptoms until several years after the asserted malpractice." *Martin, supra*, at 1279 (emphasis supplied). The Court alternatively held the statute of limitations was unconstitutional under Section 12 of the Indiana Constitution. The rationale was that because the statute required the plaintiff to file a claim before she was able to discover the alleged malpractice and her resulting injury, it imposed an impossible prerequisite on her access to the courts and pursuit of her tort remedy. *Id.*

In *Van Dusen*, a companion case to *Martin*, the plaintiff also suffered from a slow developing cancer. Similar to *Martin*, the plaintiff in *Van Dusen* suffered from a disease or condition with a long latency period and symptoms which did not surface until several years after the asserted malpractice. As such, the *Van Dusen* court held that in this case, the two-year statutory period begins to run when the plaintiff discovers facts which, in the existence of reasonable diligence, should lead to the discovery of the malpractice and resulting injury. 712 N.E. 2d at 495.

2. Indiana Courts have applied the exception only where the patient's condition is not known, or cannot be known, to the patient

Since the Supreme Court's decisions in *Martin* and *Van Dusen*, the latency exception has been applied in four cases. In three of those four cases, the plaintiff was unaware he or she was suffering from a disease until after the statute of limitations had run due to long latency periods. *See Harris vs. Raymond*, 715 N.E. 2d 388, 390 (Ind. 1999), *Weinberg vs. Bess*, 717 N.E. 2d 584 (Ind. 1999) and *Halbe vs. Weinberg*, 717 N.E. 2d 876 (Ind. 1999). The fourth application of the latency exception, *Ling v. Stillwell*, 732 N.E.2d 1270 (Ind.App. 2000), presents the extraordinary combination of death brought about by the criminal conduct of a nurse coupled with a Hospital's attempts to inhibit plaintiff's timely discovery of his cause of action. The case at bar bears little resemblance to either application of the latency exception.

In *Harris vs. Raymond*, 715 N.E. 2d 388, 390 (Ind. 1999), Dr. Harris, an orthodontist, inserted dental implants in Ms. Raymond's jaw but failed to warn her of certain defects after he received government safety alerts concerning the implant. The defective nature of the implants was known to plaintiff years later when she began to suffer the resulting symptoms. When she initiated her medical malpractice action outside the two year limitations period, the Court held that Ms.

Raymond, like Ms. Martin, was incapable of discovering that a defective product had been installed–and therefore malpractice had been committed–within the limitations period. The Court, therefore, applied the "latency exception" created in *Martin* and *Van Dusen* to deny a motion to dismiss.

Weinberg vs. Bess, 717 N.E. 2d 584 (Ind. 1999) and *Halbe vs. Weinberg*, 717 N.E. 2d 876 (Ind. 1999) present nearly identical applications of the latency exception. Ms. Halbe and Ms. Bess were both falsely informed that the breast implants Dr. Weinberg had surgically implanted contained little or no silicone. In neither case did Ms. Halbe or Ms. Bess learn of Dr. Weinberg's repeated deceptions until many years after their surgeries. In both cases, the Court ruled the "latency exception" was applicable because neither plaintiff suffered any resulting symptoms within the limitations period and therefore had no reason to commence a cause of action prior to the limitations period. "We see nothing in the record that would lead us to believe that, in the exercise of reasonable diligence, Bess should have had any reason whatsoever to suspect she had a cause of action against her doctor before [the limitations ran]." *Bess, supra*, at 590.

Raymond, *Bess*, and *Halbe* have no application to the present facts because, unlike the plaintiffs in these three cases, Mr. Harris did not suffer from a disease which he could not discover. To the contrary, Mr. Harris' symptoms were fully manifested and he was actively seeking medical treatment for his condition—for many years after the end of his relationship with Dr. Shah. As such, the latency exception as developed by *Raymond*, *Bess*, and *Halbe* should not be applied here.

The fourth application of the latency exception, *Ling vs. Stillwell*, 732 N.E.2d 1270 (Ind.App. 2000), arises from the macabre story of Orville Lynne Majors. Majors was a nurse at Vermillion County Hospital at the same time Doris Stillwell died as a patient of that Hospital on August 1,

1994. The decedent's family was told she died of natural causes. *Ling* at 1273. Doris Stillwell's death certificate reflected that she died of cardiac arrhythmia and coronary heart disease. *Id.* Due to the "epidemic level mortality rate" at the Hospital during this time, however, local law enforcement began a criminal investigation in March of 1995 which ultimately resulted in Majors' conviction for murder. *Ling* at 1273. It was not until July of 1997, however, that Doris Stillwell's family was informed that her death was a part of that investigation. *Id.* Mrs. Stillwell's son, as her representative, initiated a suit against the Hospital in September of 1997—just two months after he learned that Nurse Majors was involved in his mother's death. *Ling* at 1273-74. The Hospital moved for dismissal pursuant to the governing statute of limitations but the Court of Appeals allowed the claim to survive because, "[g]iven the facts and circumstances" of the case, Mr. Stillwell "could not have reasonably been expected to discover that his mother's death could have been the result of misconduct, medical malpractice, or negligence until after the limitations period had passed." *Id.* at 1275.

It is the extraordinary "facts and circumstances" of *Ling* which distance it from the case at bar. Doris Stillwell's death resulted not from natural causes but allegedly from the criminal conduct of Nurse Majors. The Hospital inhibited Mr. Stillwell from learning the cause of his mother's death, and only when details of the criminal investigation became public did Mr. Stillwell have cause to suspect he had a cause of action. Moreover, while Mr. Stillwell had suspicions about his mother's death prior the expiration of the statute of limitations, the Court of Appeals noted that Vermillion County Hospital had threatened to file suit against Mr. Stillwell's legal counsel if he filed a "frivolous claim" against the Hospital.

Ling does not present facts involving a disease with a long latency period delaying discovery of malpractice, as was the case in both *Martin* and *Van Dusen*. *Ling* does, however, present a clear analogy to such a latent disease and an extraordinary factual scenario on which no court of equity could turn its back. The facts in *Ling* are comparable to a disease with a long latency period because, similar to the breast cancer patient who is erroneously informed there is no condition to fear, Doris Stillwell's family was informed that she died from natural causes. The "natural" aspect of this misinformation best aligns with the latency exception because Mr. Stillwell had nothing to suspect. These facts, coupled with the basic notion that the Hospital's attempts to hamper Mr. Stillwell from learning the truth, could not be to permitted to serve as a device to shield the Hospital from liability. Mr. Harris, alternatively, was forthrightly informed that he was currently suffering from a serious medical condition. Dr. Shah did not seek to mislead Mr. Harris nor did Dr. Shah cause other subsequent treating physicians to mislead Mr. Harris. Whether the latency exception was extended to *Ling* by analogy or the simple demand of equity, the facts in the present case do not warrant such a leap here.

3. Indiana Courts have rejected the "latency exception" where the narrow conditions of *Martin vs. Richey* and *Van Dusen vs. Stotts* are not met

Martin, *Van Dusen* and their progeny are founded upon the notion that the plaintiffs could not timely discover the alleged medical malpractice due to the long latency period of their respective conditions or because extraordinary circumstances delayed discovery. By their own holdings, the *Martin* and *Van Dusen* decisions were never meant to be the panacea for the ills of all untimely plaintiffs. The specific limitations of *Martin* and *Van Dusen* are best illustrated through a discussion of recent decisions where Indiana Courts have rejected application of the "latency exception."

The Indiana Supreme Court recently declined to apply its "latency exception" in *Boggs vs. Tri-State Radiology, Inc.*, 730 N.E. 2d 692 (Ind. 2000). Mrs. Boggs sought medical treatment in July 1991 after she detected a lump in her breast. 730 N.E. 2d at 694. A mammogram was taken and she was instructed to return after one year. *Id.* On July 28, 1992, a second mammogram was taken and, based on a comparison with the first, a biopsy was recommended. *Id.* On August 12, 1992, the biopsy revealed the lump in Mrs. Boggs' breast was malignant and that the cancer had metastasized to her liver. *Id.* Mrs. Boggs died on July 28, 1993, and her husband initiated a medical malpractice action on her behalf on July 1, 1994. *Boggs* at 694. Faced with a motion for summary judgment, the trial court ruled Boggs' claim untimely. 730 N.E. 2d at 694-95. The Indiana Court of Appeals applied the *Martin* and *Van Dusen* latency exception to reverse the trial court, but the Indiana Supreme Court, on transfer, overturned the Appellate Court and reinstated the judgment of the trial court. The Indiana Supreme Court held that because Mrs. Boggs became aware of her injury eleven months before the statute of limitations expired, the latency exception was inapplicable. *Boggs* at 698. The *Boggs* court further held the 22½ month delay between discovery and filing outside the limitations period was unreasonable as a matter of law. 730 N.E. 2d at 699 (*citing Cacdac vs. Hiland*, 561 N.E. 2d 758, 758 (Ind. 1990) (22-month delay); *Cyrus vs. Nero*, 546 N.E. 2d 328, 331 (Ind.App. 1989) (22-month delay); *Spoljaric vs. Pangan*, 466 N.E. 2d 37, 43044 (Ind.App. 1984) (14-month delay)).

The "latency exception" was again rejected in *Burton vs. Elskens*, 730 N.E. 2d 1281, 1283-84 (Ind.App. 2000). The plaintiff Burton suffered a stroke immediately after a craniotomy which was performed by Dr. Elskens on October 12, 1994. *Burton* at 1282. Dr. Elskens continued monitoring Burton's progress until May 23, 1995. *Id.* Burton initiated a medical malpractice action on May 19,

1997. *Id.* The Indiana Court of Appeals held the claim was barred by Indiana's two year statute of limitations. *Burton* at 1285. The Court rejected application of the "latency exception" articulated in *Martin vs. Richey* because:

> [u]nlike the circumstances in *Martin*, Mrs. Burton did not suffer from a disease with a long latency period and her condition did 'not manifest significant pain or debilitating symptoms until several years after [an] initial diagnosis or misdiagnosis.' Nor do the circumstances [] dictate that Mrs. Burton's condition was one that the Burtons, in the exercise of reasonable diligence, could not have discovered within the two-year statute of limitations.

Burton, 730 N.E. 2d at 1285.

The "latency exception" was most recently rejected in *Coffer vs. Arndt*, 732 N.E. 2d 815, 817 (Ind.App. 2000)–a case involving a failure to diagnose. Mr. Coffer sued his former optometrist, Dr. Arndt, when a subsequent treating ophthalmologist concluded that Mr. Coffer suffered from glaucoma which had existed for several years. 732 N.E. 2d at 818. Mr. Coffer last saw Dr. Arndt in September or October of 1995. *Id.* Thereafter, Mr. Coffer was diagnosed as having glaucoma on December 19, 1995. *Id.* Mr. Coffer initiated his medical malpractice action on December 19, 1997. *Id.* The trial court summarily dismissed the Coffer complaint as untimely and, on appeal, the Indiana Court of Appeals affirmed, rejecting an application of the "latency exception." 732 N.E. 2d at 821. Similar to *Boggs*, Mr. Coffer had 22 months within which to bring his cause of action, but did not. The *Coffer* court held the applicable limitations period was constitutional as applied to Mr. Coffer and upheld the summary judgment. *Id.*

4. The "latency exception" is not available to resurrect Harris' untimely claim

The latency exception cannot save Mr. and Mrs. Harris from summary judgment because Mr. Harris did not suffer from a condition with a long latency period, nor did he face extraordinary circumstances which were out of his control and delayed his discovery of the alleged malpractice. Mr. Harris' symptoms appeared in 1991 and he sought treatment from a variety of physicians since he last saw Dr. Shah in 1993. *Martin*, *Van Dusen* and their progeny–*Raymond, Halbe, Bess and Ling* –uniformly deal with one simple concept: the manifestations of malpractice were hidden until it was too late. The plaintiffs in those cases either suffered from a disease or condition which was unknown to the patient or were otherwise actively prevented from discovering the alleged malpractice by forces beyond their control. By contrast, Mr. Harris knew he had a medical condition in 1991. Presumably this is why he went to Dr. Shah. Mr. Harris also knew he had a medical condition in 1993 when that physician-patient relationship ended, and he sought treatment from other health care providers. Unlike the plaintiffs in the *Martin* and *Van Dusen* line, Mr. Harris did not have the mistaken assumption there was nothing wrong. To the contrary, Mr. Harris had been informed that he suffered from a very serious debilitating disease for which he could, and did, seek second (and third) opinions. And, unlike the plaintiff in *Ling*, there were no extenuating circumstances which actively delayed the discovery of the alleged medical malpractice.

Tracking the language of the *Burton* court when it rejected the "latency exception": "[u]nlike the circumstances in *Martin*, [Harris] did not suffer from a disease with a long latency period and [his] condition did `not manifest significant pain or debilitating symptoms until several years after [an] initial diagnosis or misdiagnosis.'" *Burton*, 730 N.E. 2d at 1285 quoting *Martin, supra*, at 1282.

to toll the limitations period beyond the physician-patient relationship where the patient claimed constructive fraudulent concealment. 730 N.E. 2d at 698.[1]

In this case, Mr. and Mrs. Harris make an extraordinary request: that this Court toll the limitations period for seven years after the conclusion of the physician-patient relationship. The latency exception does not create a situation any different than the physician-patient relationship seen in the continuing wrong doctrine or the fraudulent concealment doctrine. Thus, Mr. and Mrs, Harris cannot distinguish themselves from the victim of a continuing wrong or fraudulent concealment to gain the special concession of tolling past the physician-patient relationship.

The three available means to toll the limitations period share one common thread: tolling is appropriate because the patient did not know and could not have known the applicable limitations period was running. Courts dealing with terminated physician-patient relationships have declined to toll the limitations period beyond the relationship because the possibility of an act or omission which could give rise to the injury at issue ends with the physician-patient relationship. *See Boggs* at 698; *Coffer* at 821. Just as those courts have held that a treating physician is relieved of exposure after the passage of two years, so too this Court must uphold the intent of the legislature.

The Trial Court erroneously denied summary judgment when it tolled the limitations period past the conclusion of the physician-patient relationship. The undisputed facts reveal that Mr. Harris last saw Dr. Shah on, and sought treatment from others after, April 12, 1993. (Appellant's App. P.10-11.) The statute of limitations expired, therefore, at the latest, on April 12, 1995. The

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[1] Active fraudulent concealment tolls the limitations period until discovery. Neither the Complaint nor Harris' brief in opposition to summary judgment argues active fraudulent concealment is present in this case, thus it is not discussed here.

Complaint was filed on July 24, 2000, five years after the latest date to which the statute of limitations could be tolled.

D. The Trial Court erroneously failed to require Plaintiffs-Appellees to initiate their cause of action within the "reasonable period" required by Indiana Courts.

Standard of Review

When reviewing a grant or denial of summary judgment, the standard of review is the same as it is for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. *Indiana University Medical Center vs. Logan*, 728 N.E. 2d 855, 858 (Ind. 2000).

Discussion

Even if this Court accepts the Harris' arguments and applies the "latency exception", dismissal remains appropriate because Mr. and Mrs. Harris did not bring his cause of action within the "reasonable period" required by the Indiana Supreme Court.

A medical malpractice plaintiff in Indiana who discovers malpractice outside the otherwise applicable limitations period "does not have two full years in which to file a claim." *LeBrun vs. Conner*, 702 N.E. 2d 754, 757 (Ind.App. 1998). "Instead, the law requires the plaintiff to institute an action within a reasonable time after the alleged malpractice is deemed to have been discovered." *Id.* Plaintiffs who sit on their rights are disfavored by the law and unreasonable delays lead to dismissals. *See, e.g., Cacdac vs. Hiland*, 561 N.E. 2d 758, 758 (Ind. 1990) (22-month delay); *Cyrus vs. Nero*, 546 N.E. 2d 328, 331 (Ind.App. 1989) (22-month delay); *Spoljaric vs. Pangan*, 466 N.E. 2d 37, 43044 (Ind.App. 1984) (14-month delay)). Most recently, the Indiana Supreme Court, in

Boggs, held the 22 ½ month delay between discovery and filing outside the limitations period was unreasonable as a matter of law. 730 N.E. 2d at 699.

Conversely, in *Ling*, the Court of Appeals noted that the plaintiff waited only two months after "discovery" to file his complaint, but given the extraordinary situation, this delay was reasonable. *Ling*, 732 N.E.2d at 1275. Thus, *Ling* affirms that even a plaintiff whose "discovery" occurs outside the statute of limitations must file within a reasonable period of time.

To oppose summary judgment, Mr. and Mrs. Harris argued that *Boggs* is distinguishable because the plaintiff in *Boggs* discovered malpractice while 11 months remained in the limitations period whereas Mr. and Mrs. Harris did not know or could not have known of the alleged malpractice until after the expiration of the limitations period. They argue that this distinction allows 23¾ months *after* "discovery" to file their claim while the plaintiff in *Boggs* was not allowed 22½ months. The Harris' argument is misplaced because it runs counter to *Ling* which confirms that the filing must occur within a reasonable period of time after "discovery" even if the statute of limitations has already run, and because it creates a windfall for plaintiffs who "discover" malpractice after their limitations period expires.

The applicable limitations period is not a discovery-based statute. As such, the "full two years" for Mr. Harris ended, at the latest, in 1995. Assuming the latency exception is applied, the Harris claim is governed by the "reasonable period standard" which provides that: "After the plaintiff is deemed to have learned of the malpractice, [he] does not have two full years in which to file a claim." *LeBrun, surpa*, 702 N.E. 2d at 757. *See also*, *Ling*, 371 N.E.2d at 1275.

Harris' attempts to distinguish *Boggs* to avoid this "reasonable period" standard seeks inequity. The *Boggs* plaintiff discovered malpractice while she was dying of cancer eleven months

before her statute of limitations was to expire. The Indiana Supreme Court held, even while she was "fighting for her life," *Boggs* was not granted "a full two years" from discovery but only "a reasonable period" in which to file her claim–and 22½ months was not reasonable as a matter of law.

Harris differs from *Boggs* only in that he "discovered" the alleged malpractice outside the limitations period whereas *Boggs* discovered malpractice within the limitations period. Harris argues this distinction entitles him to the windfall of "a full two years" from discovery where *Boggs* was not allowed 22½ months from discovery. This is a distinction without a difference. The fact Harris "discovered" the alleged malpractice outside the statute of limitations should not afford him significantly greater latitude than any other "discovery" based plaintiff.

Even without the *Boggs* decision, however, the extent of the inequity sought by Harris is profound: Harris simply disregards the precedents of other plaintiffs stricken for shorter periods. *See, e.g., Cacdac vs. Hiland*, 561 N.E. 2d at 758 (22-month delay); *Cyrus vs. Nero*, 546 N.E. 2d at 331 (22-month delay); *Spoljaric vs. Pangan*, 466 N.E. 2d at 43-44 (14-month delay). The delay between Harris' discovery and the filing of their Complaint was unreasonable as a matter of law, thus the Trial Court erroneously failed to grant summary judgment.

VIII. Conclusion

Mr. and Mrs. Harris initiated their cause of action more than nine years from the conduct alleged, more than seven years from the time his physician-patient relationship with Dr. Shah concluded and he began seeing other physicians, and more than 23¾ months after the alleged "discovery" through contravening diagnosis. The Trial Court erred when it denied summary judgment because: (1) the Trial Court erroneously converted the applicable occurrence-based statute of limitations to a discovery-based statute; (2) the Trial Court erroneously applied the judicially-

created exception to the applicable statute of limitations first recognized in *Martin vs. Richey*, 711 N.E. 2d 1273, 1284-85 (Ind. 1999) and *Van Dusen vs. Stotts*, 712 N.E. 2d 491, 493 (Ind. 1999); (3) the Trial Court erroneously tolled the statute of limitations past the cessation of the physician-patient relationship; and (4) the Trial Court erroneously failed to require Plaintiffs-Appellees to initiate their cause of action within the "reasonable period" required by Indiana Courts.

This Court should order that the Trial Court order summary judgment in favor of Dr. Shah and against Mr. and Mrs. Harris.

Respectfully submitted this 25th day of May, 2001.

KINNEY, KASHA & BUTHOD, LLP

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I certify that this brief contains less than 14,000 words.

CERTIFICATE OF SERVICE

I certify that I have caused a true and accurate copy of the foregoing Appellant's Brief and the Appellant's Appendix has been served upon the following by placing the same in the United States Mail, postage prepaid, this 25th day of May, 2001:

Glenn A. Deig
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Rebecca T Kasha
Rebecca T. Kasha

CLERK

SUPREME COURT, COURT OF APPEALS, AND TAX COURT

STATE OF INDIANA

217 STATE HOUSE, INDIANAPOLIS, IN 46204

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Brian Bishop
Clerk

Cause Number
82A01-0103-CV-00111
Lower Court Number:
82C010007CT357

SHAH, KIRIT C., M.D. -V- HARRIS, STAN & NANCY

You are hereby notified that the SUPREME COURT has on this day 5/17/02

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR EXCEPT DICKSON & BOEHM, JJ., WHO VOTE TO GRANT TRANSFER.

MS

WITNESS my name and the seal of said Court,
this 17TH day of MAY, 2002

Brian Bishop

Clerk Supreme Court, Court of Appeals and Tax Court

FOR PUBLICATION

ATTORNEY FOR APPELLANT: ATTORNEY FOR APPELLEE:

REBECCA T. KASHA **GLENN A. DEIG**
Kinney, Kasha & Buthod, LLP Evansville, Indiana
Evansville, Indiana

IN THE COURT OF APPEALS OF INDIANA

KIRIT C. SHAH, M.D.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-0103-CV-111
	)	
STAN HARRIS and NANCY HARRIS,	)	
	)	
Appellees-Plaintiffs.	)	

PERMISSIVE INTERLOCUTORY APPEAL
FROM THE VANDERBURGH CIRCUIT COURT

The Honorable Carl A. Heldt, Judge
Cause No. 82C01-0007-CT-357

November 16, 2001

OPINION - FOR PUBLICATION

MATHIAS, Judge

Dr. Kirit C. Shah ("Dr. Shah") appeals the trial court's order denying his motion for summary judgment. Dr. Shah raises the following issue: whether the trial court erred when it found a genuine issue of material fact regarding whether Stan and Nancy Harris ("Harrises") filed their complaint within the applicable two-year statute of limitations. We agree that there remain no genuine issues of material facts regarding the statute of limitations. However, we believe that the Harrises timely filed their complaint and accordingly, we affirm the trial court's denial of Dr. Shah's summary judgment motion and remand to the trial court for entry of summary judgment in favor of the Harrises on this issue. We hand this case down with a companion case, Rogers v. Mendel, ___ N.E.2d ___ (Ind. Ct. App. 2001), which raises essentially the same issues but with a different result, reached by a different panel of this court.

Facts and Procedural History

The facts most favorable to the trial court's judgment reveal that Dr. Shah, a neurologist, first treated Stan

Harris on June 20, 1991. Dr. Shah diagnosed Harris with multiple sclerosis on July 11, 1991, and continued to treat Harris until April 12, 1993, at which time Dr. Shah relocated outside of the area. Thereafter, Harris sought treatment from other physicians. Then on July 31, 1998 (almost exactly seven years after the original, erroneous diagnosis), another physician diagnosed Harris' illness as a vitamin B-12 deficiency, rather than multiple sclerosis.

On July 24, 2000 (one week less than two years from the date of the second diagnosis), the Harrises simultaneously filed their Proposed Medical Malpractice Complaint with the Indiana Department of Insurance, and their Complaint in Vanderburgh Circuit Court against Dr. Shah. On December 14, 2000, Dr. Shah filed a motion for summary judgment. After briefing was completed, the trial court held a hearing on January 30, 2001, after which it denied Dr. Shah's summary judgment motion because it found genuine issues of material fact as to whether the Harrises timely filed their complaint.

On February 15, 2001, the trial court certified its summary judgment order for interlocutory appeal. On April 2, 2001, this court accepted Dr. Shah's permissive interlocutory appeal.

Standard of Review

Summary judgment is a procedural means to halt litigation when there are no factual disputes and to allow the case to be determined as a matter of law. LeBrun v. Conner, 702 N.E.2d 754, 756 (Ind. Ct. App. 1998). Under Indiana Trial Rule 56, the moving party bears the burden of showing that there are no genuine issues of material fact. If the moving party meets its burden, the burden shifts to the non-moving party to set forth facts showing the existence of a genuine issue for trial. Ind. Trial Rule 56(C), 56(E); Oelling v. Rao, 593 N.E.2d 189, 190 (Ind. 1992).

Summary judgment is appropriate only if there is no evidence of a genuine issue of material fact for trial and the moving party is entitled to judgment as a matter of law. Aide v. Chrysler Fin. Corp., 699 N.E.2d 1177, 1180 (Ind. Ct. App. 1998), trans. denied. However, summary judgment is inappropriate if any material facts are in dispute or even if undisputed facts could "lead to conflicting material inferences." Butler v. City of Indianapolis, 668 N.E.2d 1227, 1228 (Ind. 1996). Additionally, when a party files a motion for summary judgment, that movant bears the risk of entry of summary judgment in favor of the non-movant, even though the non-movant has not filed a cross-motion for summary judgment. Ind. Trial Rule 56(B).

If the moving party asserts the statute of limitations as an affirmative defense and establishes that the action was commenced outside of the statutory period, the non-moving party then has the burden of establishing an issue of fact material to a theory that avoids the affirmative defense. Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692, 695 (Ind. 2000) (citing Conard v. Waugh, 474 N.E.2d 130, 134-35 (Ind. Ct. App. 1985)).

Discussion and Decision

Dr. Shah argues that he is entitled to summary judgment because the Harrises failed to file their complaint within the two-year, occurrence-based limitations period for medical malpractice suits. He asserts that the trial court first erroneously interpreted the occurrence-based statute of limitations as a discovery-based statute of limitations and then erroneously applied the exception to the medical malpractice statute to this case. Dr. Shah contends that the Harrises should have filed their complaint at the latest within two years of April 12, 1993, the last date Harris was under Dr. Shah's care. Therefore, Dr. Shah argues that the Harrises' filing of their proposed complaint on July 24, 2000, is approximately five years too late and barred by the statute of limitations.

The statute of limitations for medical malpractice claims is found at Indiana Code section 34-18-7-1(b):

b) A claim, whether in contract or tort, may not be brought against a health care provider based upon professional service or health care that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect, except that a minor less than six (6) years of age has until the minor's eighth birthday to file.

Ind. Code § 34-18-7-1(b) (1998). This occurrence-based statute of limitations has been upheld as constitutional on its face under the Indiana Constitution, Article I, Sections 12 and 23, but has also been held to be unconstitutional as applied in certain circumstances. Van Dusen v. Stotts, 712 N.E.2d 491, 493 (Ind. 1999); Martin v. Richey, 711 N.E.2d 1273, 1284-85 (Ind. 1999). This statute requires the filing of a medical malpractice action within two years of the alleged negligent act and has been upheld as constitutional when applied to all plaintiffs able to discover the alleged malpractice and injury within two years from the occurrence. See Martin, 711 N.E.2d at 1278.

In Martin, on March 13, 1991, Martin went to her gynecologist's office, Dr. Richey, complaining of a lump and "shooting pains" in her right breast. Because Richey was out of town, a nurse practitioner examined Martin and arranged for her to have a mammogram at the hospital that same day. The radiologist who read the report noted that Martin had a benign cyst above the nipple in the right breast and a "solid echogenic mass in the lower quadrant of the right breast." In the report, the radiologist advised that a biopsy be done on the mass. Id. at 1274-75.

On March 14, the next day, the nurse practitioner called Martin to inform her of the mammogram results and the radiologist's recommendation that she have a biopsy conducted on the mass. Then on the following day, March 15, Martin called the nurse practitioner to inform her that she had scheduled an excisional biopsy with a general surgeon in four days, on March 19. Martin also left a message for Richey to call her upon his return to his office. See id. at 1275.

On March 18, when Richey returned to his office, the nurse practitioner informed him of all the events surrounding Martin's exam and mammogram and that Martin had already scheduled a biopsy for the following day with a general surgeon. Richey then called Martin that evening and told her to cancel the scheduled biopsy because he wanted to perform a needle aspiration on her instead. The aspiration occurred in Richey's office on March 20. See id. at 1275-76.

Richey first aspirated fluid from the cyst and then using the same needle, attempted to aspirate fluid from the solid mass. Richey was finally able to aspirate fluid on the sixth attempt but was still unsure as to whether the fluid came from the mass or the surrounding tissue. The pathology report indicated no presence of malignant tumor cells in the fluids drawn by Richey. See id. at 1276.

Both Martin and the nurse practitioner (who was present during the needle aspiration) testified that at no time did Richey inform Martin that she needed to seek any follow-up treatment, such as a biopsy. And, even though Richey testified that he did in fact advise Martin to seek follow-up testing, there were no notes to this effect in his files. Martin experienced no symptoms and did not seek any further medical treatment or testing for the lump until three years later, in April 1994, at which time she began experiencing increased pain from the lump and pain under her right arm. See id. at 1276-77.

In April 1994, Martin had a mammogram, the results of which revealed an abnormal mass in her right breast, located in the same place as the mass identified in the original mammogram in 1991. A biopsy resulted in a diagnosis of adenocarcinoma of the breast and on April 15, 1994, Martin underwent a right modified radical mastectomy. Martin then had to undergo chemotherapy from May 1994 through September 1994 because the cancer had spread to her lymph nodes. Martin filed her complaint against Richey in October 1994. Richey filed a motion arguing that Martin's action was time-barred by the two-year medical malpractice statute of limitations. See id. at 1277.

Upon review of Martin's case and the companion case of Van Dusen, 712 N.E.2d at 491, the Indiana Supreme Court held that under Article I, Sections 12 and 23 of the Indiana Constitution, the two-year statute of limitations applicable to medical malpractice claims is unconstitutional as applied to plaintiffs such as Martin, who could not have discovered the injury with reasonable diligence within two years of the alleged misconduct. Van Dusen, 712 N.E.2d at 493; Martin, 711 N.E.2d at 1282, 1284-85. In order to qualify under this exception, a plaintiff must have "no information that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and . . . resulting condition during the statutory period." Van Dusen, 712 N.E.2d at 493. Our supreme court further held in Van Dusen that in such cases where this statute of limitations is unconstitutional as applied, a plaintiff is given a full two-year time period within which to file suit, starting from the time "they discover the malpractice and the resulting injury or facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury." Id.

In Van Dusen, Stotts visited his family doctor in June 1992 for a head cold at which time his doctor performed a routine exam of his prostate. Upon detecting an abnormality, his family doctor then referred Stotts to an urologist, who performed a needle biopsy on a small tumor in Stotts' prostate. The biopsy was sent to the defendant doctors and hospital for diagnosis. In late July 1992, the defendant doctors interpreted the biopsy as benign. The urologist relied on this diagnosis and informed Stotts that the biopsy results showed no cancer. See id. at 494.

More than two years later, in November 1994, Stotts experienced pain and swelling in his groin area. He returned to his family doctor who again referred him to the same urologist. In January 1995, the urologist concluded that Stotts had metastatic cancer resulting from a prostate tumor that had possibly been erroneously diagnosed as noncancerous in July 1992. The urologist confirmed the erroneous diagnosis in February 1996.

Stotts then filed his complaint against the defendant doctors in April 1996. See id.

Our supreme court held that the medical malpractice statute of limitations was unconstitutional as applied to Stotts because he was "unaware that he had cancer and that it had spread to his lymph nodes until more than two years following the alleged negligent act," id. at 493, finding January 1995 (when Stotts was told that the biopsy diagnosis was possibly erroneous) the triggering date from which to start the two-year statute of limitations. Id. at 494. The court reasoned that Stotts had no information during the two years following the alleged act that could lead a reasonably diligent person to discover the alleged malpractice and resulting injury. Id. at 493.

More recently, in Boggs v. Tri-State Radiology, Inc., our supreme court applied the Martin and Van Dusen rules in upholding the constitutionality of the medical malpractice statute of limitations as applied to a decedent, Boggs, who discovered, or could have discovered with reasonable diligence, the alleged malpractice and resulting injury within the two-year period after the occurrence of the alleged misconduct. Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692, 694 (Ind. 2000). Boggs visited her doctor in July 1991 after detecting a mass in her left breast. Her doctor ordered a mammogram during the first visit and then again in July 1992. Both tests were conducted at the doctor's office and interpreted by Tri-State Radiology. In August 1992, Boggs had a biopsy, which revealed a malignant mass in her left breast. She died in July 1993, and in July 1994, Boggs' husband filed a complaint. See id.

Our supreme court held that the claim was barred by the statute of limitations because the alleged malpractice occurred in July 1991, and Boggs discovered the injury in August 1992, which left the Boggs with eleven months before the expiration of the statute of limitations during which to file the complaint. Id. at 695. The court acknowledged, "medical malpractice plaintiffs will frequently, if not virtually always, have varying amounts of time within which to file their claims before an occurrence-based statute of limitations expires." Id. at 697. Nevertheless, the court found that "[a]s long as the claim can reasonably be asserted before the statute expires, the only burden imposed upon the later discovering plaintiffs is that they have less time to make up their minds to sue." Id.

In the case before us, Dr. Shah requests that we reverse the trial court because there are no genuine issues of material fact with regard to the timing of the Harrises' filing. We agree that there are no genuine issues of material fact with regard to the statute of limitations issue; however, we find as a matter of law that the Harrises' complaint was filed in a timely manner.

It is undisputed that in July 1991, Dr. Shah diagnosed Harris with multiple sclerosis. Harris' last visit with Dr. Shah was on April 12, 1993, because Dr. Shah moved out of the area. It is also undisputed that Harris remained under the care of other physicians in the following years under the belief that he had multiple sclerosis. In July 1998, one of Harris' physicians allegedly correctly diagnosed his illness as a vitamin B-12 deficiency, rather than multiple sclerosis. Although it was Harris received this diagnosis approximately seven years after Dr. Shah's diagnosis (July 1991) and approximately five years after their physician-patient relationship ended (April 1993). However, when Harris found out that Dr. Shah's July 1991 diagnosis was erroneous, Harris had received "hadno information that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice . . . during the statutory period." Van Dusen, 712 N.E.2d at 493.

In response, Dr. Shah asserts that the Martin and Van Dusen rules of construction regarding the medical malpractice statute of limitationsholdings are distinguishable and not applicable to this case because, he asserts, Martin and Van Dusen considered **the** rules only apply to diseases with long latency periods, which is not the situation here. We find no case law that would support the restriction of the analysisinterprets the supreme courts' rules of construction with regard to the medical malpractice statute of limitations to restrict the exception announced in Martin and Van Dusen to specific types of diseases, nor do we discern any public policy or common sense reason for doing sosuch a restriction.

In our consideration of the medical malpractice statute of limitations and its application to the undisputed facts before us, we do not write on a clean slate. Martin, Van Dusen, and Boggs together create a two-stage analysis for the application of Indiana's two-year, medical malpractice limitation period. If a claimant discovers the alleged malpractice and resulting injury, or possesses information that would lead a reasonably diligent person to such discovery during the two-year period, then the purely occurrence-based, limitation period is both applicable and constitutional, so long as the claim can reasonably be asserted before the period expires. Boggs, 730 N.E.2d at 697-98; Van Dusen, 712 N.E.2d at 497-98; Martin, 711 N.E.2d at 1279-80. This first stage of analysis will be the only analysis required under most facts and circumstances.

If, however, a claimant does not discover the alleged malpractice and resulting injury, and does not possess

information that would lead a reasonably diligent person to such discovery during the two-year period, then the purely occurrence-based, limitation period is unconstitutional as applied. Van Dusen, 712 N.E.2d at 497-98; Martin, 711 N.E.2d at 1279-80. Under these facts and circumstances, a second stage of analysis must be applied to determine when the claimant possessed enough information that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and resulting injury. The date determined is the date the two-year limitations period begins to run for such a claimant. Van Dusen, 712 N.E.2d at 497-98; Martin, 711 N.E.2d at 1279-80.

Whether Indiana Code section 34-18-7-1 is constitutional as applied is a question of law to be determined by the trial court on a case-by-case basis. In some instances, this question will be subject to resolution on the basis of undisputed facts, as in the case before us. In other instances, the judge will be required to resolve disputed facts through pre-trial motion practice in order to determine the date upon which the claimant possessed enough information that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and resulting injury.

In the case before us, the two-year statute of limitations began to run at the latest when Dr. Shah and Harris' physician-patient relationship ended on April 12, 1993. because the termination of the relationship also terminates the alleged negligence. Therefore, under Indiana Code section 34-18-7-1(b), the pure, occurrence-based statutory period of limitation expired on April 12, 1995., two years after the alleged negligent conduct However, Dr. Shah cites no evidence and we find no evidence or inference in the record that would create an actual or inferential conflict with the allegation contained in the Harrises' complaint, a document designated by Shah under Indiana Trial Rule 56(c), that Harris did not possess enough factual information for a reasonably diligent person to discover the alleged malpractice and injury until July 31, 1998. See Boggs, 730 N.E.2d at 697; Van Dusen, 712 N.E.2d at 497; Martin, 711 N.E.2d at 1284. Therefore, the rulesecond stage of analysis announced in Van Dusen applies here to toll the statutory period until Harris discovered the alleged malpractice and the resulting injury or until Harris hadobtained that information ison July 31, 1998, when Harrishe learned that his illness may have been misdiagnosed seven years earlier. Harris then had two years within which to file his action, or until July 31, 2000. Harris filed his action on July 24, 2000, within the applicable statutory limitations period. *See footnote*

Conclusion

Because the Harrises filed their medical malpractice action within the appropriate limitations period, we affirm the trial court's ord r denying Dr. Shah's motion for summary judgment and remand for entry of summary judgment in favor of the Harrises on the issue of the statute ofapplicable statutory limitations period.

Affirmed and remanded.

DARDEN, J., and VAIDIK, J., concur.

Footnote: Dr. Shah also discusses the theory of fraudulent concealment, which often arises in cases involving statute of limitations issues. See Hughes v. Glaese, 659 N.E.2d 516, 519 (Ind. 1995) (discussing active and constructive fraudulent concealment). Because we find that the Harrises timely filed their claim, we do not need to discuss the applicability of this theory, which was not raised or argued by the Harrises to the trial court.

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